Focus on Competition Law Enforcement in E-commerce Sector in Serbia

by

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CONTENTS

Abstract

Competition authorities in countries in development in Europe have a long way to go until they meet the EU standards. Although the local legislation in non-EU members is harmonized with EU legislation for the most part, the enforcement part is the one where obstacles are traditionally more challenging, and Serbia is no

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exception to this rule. Serbia has had its share of problems when trying to enforce rules on protection of competition, and some of those battles are still being fought, however, the national competition authority now also needs to face rapid changes that come with emerging markets, especially e-commerce. Although e-commerce itself may facilitate anti-competitive behaviors, it seems that they may also have had an effect of a much-needed nudge for the Serbian Commission for the Protection of Competition (CPC) to finally dive into variety of enforcement powers that they have been entrusted with.

Résumé

Les autorités de la concurrence des pays européens en développement ont encore un long chemin à parcourir avant d'atteindre les normes européennes. Bien que la législation nationale des pays qui ne sont pas membres de l'UE soit en grande partie harmonisée avec la législation européenne, c'est au niveau de l'application que les obstacles sont traditionnellement les plus difficiles à surmonter. La Serbie ne fait pas exception à cette règle. La Serbie a connu sa part de problèmes lorsqu'elle a tenté de faire respecter les règles de protection de la concurrence. Alors que certaines de ces batailles sont encore en cours, l'autorité serbe de la concurrence doit désormais également faire face aux changements rapides qui accompagnent les marchés émergents, en particulier le commerce électronique. Bien que le commerce électronique en lui-même puisse faciliter les comportements anticoncurrentiels, il semble qu'il ait également eu l'effet d'un coup de pouce dont la Commission serbe pour la protection de la concurrence (CPC) avait bien besoin pour enfin se plonger dans les divers pouvoirs d'exécution qui lui ont été confiés.

Key words: competition law enforcement; e-commerce; price monitoring mechanisms; retail price maintenance; control of concentrations; Serbia; competition advocacy.

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I. Introduction

The emergence of digital markets, e-commerce specifically, has been a trending topic lately. It has certainly prompted the European Commission to render new regulations, namely the Digital Services Act ("DSA")[1] and

[1] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L 277/1, p. 1–102.

the Digital Market Act ("DMA")[2]. As stated on the official website of the European Commission, the DSA and the DMA form a single set of rules that apply across the whole EU[3]. Their two main goals are (i) to create a safer digital space in which the fundamental rights of all users of digital services are protected; and (ii) to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.

The above acts of the European Commission were preceded by several publications by OECD, one of which – "Implications of E-Commerce for Competition Policy"[4], emphasizes that specific dynamics arise within e-commerce markets, and that e-commerce is, at its core, effectively a question of retail competition.

In Serbia, the general Law on Protection of Competition[5] (the "Law") only contains general rules that mostly include the same provisions as Articles 101 and 102 the Treaty on the Functioning of the European Union. The Serbian Law on Electronic Commerce[6] (hereinafter: "LEC") also consists of very basic provisions relating to information society services, commercial communication rules, and entering into contracts by electronic means. The LEC explicitly provides that it does not apply to restrictive agreements in terms of antitrust regulations. There are in total eight decrees and several guidance documents enacted by the Serbian Commission for Protection of Competition ("CPC"), but none of them tackling any matter of specific importance for e-commerce. The decrees relate to procedural issues and block exemptions. Therefore, Serbian legislation, both antitrust and sector-specific, does not regulate any issues relating specifically to e-commerce.

Regardless of the above, in the last two years, following these global trends, the CPC's special focus has been on the e-commerce sector, in a double sense: as a sector that deserves special attention and control, to protect consumers, but also as a means of detecting violations of competition rules. The purpose of

[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265/1, p. 1–66.

[3] European Commission, *The Digital Services Act Package* <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 2 April 2023.

[4] In June 2018, the Organization for Economic Cooperation and Development (OECD) held a roundtable discussion to explore the implications of e-commerce on competition law and policy within the OECD. The publication "Implications of E-Commerce for Competition Policy" includes materials from said roundtable, and can be viewed at the following link: <https://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm>.

[5] The Serbian Law on Protection of Competition – Official Gazette of the Republic of Serbia nos. 51/2009, and 95/2013. English translation is available on the website of the Serbian Commission for Protection of Competition at the following link: <https://kzk.gov.rs/en/zakon-2>.

[6] The Serbian Law on Electronic Commerce – Official Gazette of the Republic of Serbia nos. 41/2009, 95/2013 and 52/2019.

this article is to provide and discuss the CPC's activities in this sector, to make a comparison between local and global trends in competition enforcement in e-commerce, as well as to provide some conclusion and highlight what would, in our opinion, be some favorable solutions in terms of update of relevant legislation as well as beneficial enforcement activities of the CPC.

II. Overview of CPC's activities relating to e-commerce

The CPC seems to be following, to a certain extent, the global trends related to enforcement of competition rules between undertakings in e-commerce sector and other related markets (the comparison will be provided under the next section of this paper). The importance of relationships in this market, and the effect of such relationships on consumer wellbeing, prompted the CPC to perform more than several dawn raids due to suspicion of both explicit and tacit conclusion of restrictive agreements[7], as well as to perform a specific sector analysis related to the market of digital platforms that intermediate in the sale and delivery of certain goods, which then led to launching of proceedings for abuse of dominant position. Therefore, this paper will include an overview of the following CPC's activities related to e-commerce:

1) Proceedings initiated ex officio for the purpose of infringement determination relating to restrictive agreements;
2) Sector analysis of the market of digital platforms that intermediate in the sale and delivery of mainly restaurant food and other products (on-demand delivery platforms);
3) proceeding for the determination of abuse of dominant position against one of the major participants on the on-demand delivery platforms market;
4) CPC's limited activities in concentrations in e-commerce sector.

1. Proceedings relating to Restrictive Agreements

In the last two years, the CPC has initiated five *ex-officio* proceedings whereby the CPC's starting point was analysis of prices of online shops and official websites of retailers, in order to determine whether infringement relating to restrictive agreements has occurred, as further examined below:

[7] Ibid., Article 10, paragraph 2, «Restrictive agreements can be contracts, certain provisions of contracts, express or tacit agreements, concerted practices, as well as decisions on the form of association of market participants.»

1) Case 4/0-01-176/2021-35, Comtrade Distribution and others[8]
The CPC initiated an *ex officio* procedure against Comtrade Distribution for the purpose of determining whether the company has influenced prices relating to the Tesla brand (owned by Comtrade Distribution). The case was expanded to an additional five undertakings that perform retail sale of the Tesla brand. By analyzing the conditions of competition on the market of wholesale and retail trade in consumer electronics in Serbia, and by looking at publicly available price data, the CPC found that retail stores as well as the websites of retailers, in particular the retailers who are parties to the proceedings in question, offer Tesla brand products at identical or nearly identical prices. CPC's aim during this proceeding was to examine whether price fixing infringement had occurred, specifically if Comtrade Distribution limited its resellers to determine the price of Tesla brand products freely and independently. As explained in the CPC's decision, price fixing constitutes a serious antitrust infringement since it significantly limits the competition between resellers, thus leading to an increase of retail prices and damages to consumers. Therefore, such restrictive agreements are prohibited, without the need to prove the significant anticompetitive effect that such agreements have.
To correctly determine the facts, the CPC also performed dawn raids at the premises of all six undertakings concerned, two of which were conducted at Comtrade's premises[9]. According to statements of employees given during the dawn raids, it was determined that Comtrade Distribution employees monitored and documented the retail prices of its buyers (i.e. resellers) through an online portal that provides retail price comparison. Further, the most significant proof that the CPC found was extensive e-mail correspondence between the Comtrade Distribution employees, as well as between Comtrade Distribution and the other undertakings under review, the subject of which was price determination in stores as well as through online sale.
The CPC determined that Comtrade Distribution and the five other undertakings under review entered into restrictive agreements and were all fined.

[8] CPC Case 4/0-01-176/2021-35 – Comtrade Distribution d.o.o. – Tehnomanija d.o.o. – Gigatron eksport-import, prodaja i servis računara na veliko i malo d.o.o – Tehnomedia Centar d.o.o. – Emmezeta Srbija d.o.o. – XLS d.o.o, 2 July 2020 <http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/01/re%C5%A1enje-02-07-2021-ComTrade.pdf> accessed 2 April 2023.

[9] This is a highly unusual practice and one can say that such dawn raid may have been a fishing expedition, although there is no statutory limitation when it comes to the number of dawn raids conducted within one proceeding. For more information about EU-level case law related to fishing expedition see Case C-583/13 P *Deutsche Bahn AG and Others v European Commission* EU:C:2015:404.

2) Case 4/0-01-177/2021-03, Roaming Electronics and others[10]
The case was initiated *ex officio* by the CPC against Roaming Electronics and five other undertakings. Roaming Electronics is the importer/distributor of consumer electronics, which it sells to retailers, the five other undertakings in this procedure being the major ones. The CPC was prompted to initiate this investigation since by looking at the available data on the prices of individual consumer electronics products, it emerges that in the retail stores of these companies, as well as on their websites, the products in question are offered at identical or almost identical prices.
The case is essentially identical to the one described above, both in terms of the actions undertaken by the CPC as well as in its findings. It is worth mentioning that the CPC found that Roaming Electronics monitored the retail prices of its customers and achieved this in several ways, among other through publicly available information (retailers' websites), as well as through the "Kliker" platform – a price tracking web application, that allowed the undertaking in question not to visit each customer's website separately, thus making it easier for it, as the distributor, to monitor and enforce restrictions on the implementation of the retailer's suggested retail price.
The CPC determined that Roaming Electronics and four out of the five other undertakings under review entered into restrictive agreements and were fined.

3) Case 4/0-01-175/2021, SF1 Coffee[11]
The CPC states that, based on Eurostat data for year 2019[12], it determined that the prices of consumer electronics in Serbia were 13% higher compared to the average prices in the European Union and for this reason, the CPC analyzed the conditions of competition on the wholesale and retail market of consumer electronics in Serbia. By reviewing the official websites of six retailers of consumer electronics, it was determined that for four models of coffee machines of the Nespresso brand, all observed retailers have identical prices for the models they offer. The CPC concluded that the importer, i.e. the distributor of

[10] CPC Case 4/0-01-177/2021-03 – Roaming Electronics d.o.o. – XLS d.o.o. – Gigatron eksport-import, prodaja i servis računara na veliko i malo d.o.o. – Tehnomedia Centar – Emmezeta Srbija, 2 July 2021 <http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/01/RESENJE-ROAMING.pdf> accessed 2 April 2023.

[11] CPC Case 4/0-01-65/2022-11, SF1 Coffee, 19 August 2022 <http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/09/Resenje-SF1_Coffee.pdf> accessed 2 April 2023.

[12] Ibidem, p. 2.

the Nespresso brand coffee machines, was the company SF1 Coffee. Based on the aforementioned, the CPC reasonably assumed that the identical or almost identical prices are the result of infringement in the terms of price fixing by company SF1 Coffee and thus initiated an *ex officio* procedure against this undertaking.
The CPC performed a dawn raid, and provided a review of the documents, agreements, pricelists, and e-mail correspondence. The CPC found that: a) SF1 Coffee formed its wholesale price based on its own retail price, which was presented in price lists as "price without VAT"; b) SF1 Coffee had determined the same rebate amount with all of its customers; c) both SF1 Coffee and all its customers, according to the provisions of the contract, respected the obligation to apply the percentage of the agreed rebates as a percentage of the margin, both during regular and during promotional sales, as a result of which there were no deviations between customers in the placement of selling prices, except for certain specifics; d) the amount of the basic price rebate had a sufficient value for the customer to accept such an amount; e) customers requested from SF1 Coffee to provide them with the prices that they will apply in further sales, and SF1 Coffee complied with such requests.
Based on the aforementioned, the CPC concluded that the described determination of the margin percentage, in conditions of an equal purchase price, indirectly leads to the determination of the retail price, thus factually represents price fixing in resale. The CPC further concluded that the objective of SF1 Coffee's business strategy was the determination of resale prices in a fixed amount equal to retail prices of SF1 Coffee. Implementation of this business strategy constitutes a restrictive agreement with retailers that is intended to significantly limit and prevent competition. SF1 Coffee was fined.

4) Case 4/0-01-650/2022-1, Apcom CE, Hungary and Apcom Serbia[13]
The CPC analyzed the competition conditions on the market for: 1) mobile phones, 2) smart watches, 3) accessories (headphones and wireless headphones), 4) "smart" TV boxes and 5) peripheral computer equipment (keyboards and mice), among other for the Apple brand product in the Republic of Serbia. Looking at publicly available data, the CPC concluded that the prices of individual Apple brand products in the Republic of Serbia are the same at the observed retailers of products of this brand, regardless of whether the retailers is a "Apple" authorized seller or not,

[13] CPC case 4/0-01-650/2022-1, Apcom CE and Apcom Serbia, 22 September 2022 <http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/10/ZAKLJUCAK-O-POKRETANJU-POSTUPKA-Apple.pdf> accessed 2 April 2023.

and regardless of in store or online sale. Taking into account the above, the CPC has suspected the existence of competition infringement in terms of restrictive agreements and has decided to investigate the case. At this point, there is no published decision of the CPC regarding the outcome of this case, therefore it may be concluded that the procedure is still ongoing.

5) Case 4/0-01-318/2023-1, Vaillant[14]
On the website of Vaillant company, the CPC found the price list of "Vaillant" brand, and upon its inspection, the CPC determined that it contains the wholesale and retail prices of the brand's products. Bearing in mind the above, the CPC compared the retail prices from this price list with the retail prices shown on the websites of the observed authorized distributors. The CPC determined that the prices are identical at all observed retailers, for the Vaillant brand as well as for the Protherm brand (also a brand of Vaillant group). These prices were also identical with the ones from the price list available on the Vaillant and Protherm websites.
Taking into account the above, the CPC has suspected the existence of competition infringement in terms of restrictive agreements and has decided to investigate the case. At this point, there is no published decision of the CPC regarding the outcome of this case, therefore it may be concluded that the procedure is still ongoing.

Judging by the explanations provided in the relevant decisions and conclusions of the CPC, it may be concluded that e-commerce is of particular importance to the CPC as a tool for detecting anticompetitive behavior. As described above, the CPC has extensively used e-commerce tools to detect violations in the retail sector on more than several occasions, and it may be anticipated that this practice will further expand.

2. Sector analysis of the market of on-demand delivery platforms

In February 2023, the CPC published a Sector Analysis for the Market of Digital Platforms that Intermediate in the Sale and Delivery of Mainly Restaurant Food and Other Products[15], relating to years 2020 and 2021

[14] CPC case 4/0-01-318/2023-1, Vaillant, 19 January 2023 <http://www.kzk.gov.rs/kzk/wp-content/uploads/2023/01/ZAKLJUCAK-O-POKRETANJU-POSTUPKA-Vaillant.pdf> accessed 2 April 2023.

[15] "Digital platforms that intermediate in the sale and delivery of mainly restaurant food and other products" are here also referred to as "on-demand delivery platforms" for short.

(hereinafter referred to as "Sector Analysis")[16]. The main aim of the Sector Analysis was to review and analyze the state of competition in the subject area market and point out possible problems in terms of restrictions or any other anticompetitive issues.

The CPC was prompted to perform an analysis of this market due to the dynamic development of the on-demand delivery platforms and frequent changes in the ownership structure of market participants. The adoption of new acts in the European Union that regulate certain aspects of online business platforms, and above all platforms that have market power, also contributed to this choice.

The main sources of information for the Sector Analysis were: i) data submitted by market participants, i.e. on-demand delivery platforms, as requested by the CPC in survey form, as well as documents / agreements requested by the CPC; ii) data provided by market participants' partners, i.e. data delivered by restaurateurs and other vendors, also requested by the CPC in survey form and iii) other publicly available data.

2.1. Definition and business models of digital platforms

The CPC views digital platforms as intermediaries that connect two or more user groups, i.e. virtual places where users can independently act or perform transactions with other user groups. The CPC differentiates three basic types of business models of digital platforms in the sector that is reviewed, i.e. on-demand delivery platforms: i) business model that involves only receiving orders via digital platforms; ii) business model that includes receiving orders and organizing delivery through digital platforms; and iii) business model of vertically integrated platforms ("full-stack model") which, in addition to only receiving orders and organizing deliveries via digital platforms, also includes food preparation in cloud kitchens (delivery-only restaurants without dining areas for customers and no physical storefront). In line with the data obtained during the analysis, most (although not all) of the market participants in Serbia are business models listed under "ii)" in the above paragraph.

The CPC has singled out several of the most significant segments that characterize the on-demand delivery platforms in Serbia, such as the fact that all of the market participants have stated their web applications as their key resources; their end users (consumers) and service providers (restaurants /

[16] CPC, Izveštaj o sektorskoj analizi stanja konkurencije na tržištu digitalnih platformi za posredovanje u prodaji i isporuci pretežno restoranske hrane i ostalih proizvoda 2020–2021. Godina (2022), published on February 21, 2023 (Sector Analysis). It is available at the CPC's website, at the following link: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2023/02/Sektorska-analiza_digitalnih-platformi_dostava-hrane.pdf> accessed 2 April 2023.

/ stores and delivery partners) as their key user categories; that most market participants indicate intermediary services, i.e. networking and connecting users in search of food or consumer goods as their key activities; etc.

2.2. Market structure and market share

The analysis of the on-demand delivery market structure was carried out based on the amount of revenues generated on the territory of the Republic of Serbia. The revenues of market participants in 2020 was around RSD 1,3 billion (about EUR 11 million), while in 2021 revenues amounted to about RSD 2,4 billion (about EUR 20 million), which means that there was an increase in business income by over 80%[17], and could explain the CPC's special interest in this fast-growing market.

Reviewing the market share of relevant participants (six in year 2020 and five in year 2021), it was concluded that the relevant market is highly concentrated, and that three digital platforms stood out in year 2020[18]. In June 2021, the leading market participant of the year 2020 was acquired by another market participant that ranked third at the time. As a result, the acquiring party gained a market share of 60-70% in the year 2021[19].

The market structure and share were also analyzed, considering all orders and deliveries for each territorial unit separately, and the overall market share results only marginally varied compared to the market share calculated based on revenue.

2.3. Market entry barriers

The CPC concluded that, apart from certain administrative requirements that apply to any market, market participants are not obliged to fulfill any other legal and regulatory prerequisites. Moreover, the Serbian Classification of Business Codes does not include a code for the provision of food delivery mediation services using digital platforms, therefore market participants have registered different codes as their main business activity, for example "computer consultancy activities – 6202" and "advertising agencies – 7311" (these codes are harmonized with the EU NACE codes).

In general, market participants themselves have stated that in their opinion there are no regulatory, administrative, or other types of technical barriers for their businesses in Serbia[20]. Based on its analysis of this matter, the CPC states

[17] Ibidem, p. 9.
[18] Ibidem, p. 9.
[19] Ibidem, p. 9.
[20] Ibidem, p. 12.

that there are no legal (institutional) barriers for the entry of new participants into the on-demand delivery platforms market. On the other hand, significant investments for platform development, marketing, and advertising, including procurement of branded equipment and promotional materials, as well as investments in the purchase of technical equipment (equipment for receiving orders, etc.) can represent an economic barrier. Also, investments for integration with the systems and services of global Internet service providers as well as conclusion of partnership agreements with Internet service providers can represent entry barriers for new market participants. In addition, the CPC is of the opinion that significant indirect network effects may imply competition for the market, instead of competition within the market itself.

Further, the CPC analyzed relations between on-demand delivery platforms and i) restaurants and other vendors[21]; ii) delivery partners; iii) technical partners:

1) Cooperation between on-demand delivery platforms, restaurants and other vendors

   This cooperation is defined by agreements or general business terms of the on-demand delivery platforms. The analysis of the CPC took into account various aspects of this cooperation, including:

   – Preconditions for cooperation: the CPC has raised its concern that providing special equipment for receiving orders by the digital platforms, can lead to the binding of partners to only one digital platform, which in the end may lead to a decrease in positive effects of simultaneous use of multiple digital platforms (multihoming).
   – Commission rate: the commission rate is subject to negotiation, however, it may be worth mentioning that the surveyed restaurants and other vendors also stated that they were unable to achieve significantly more favorable conditions using their bargaining power.
   – Product pricing: the market participants have stated that the prices listed on the on-demand delivery platforms are determined freely by the restaurants and other vendors and that the prices may differ between those stated on the on-demand delivery platforms and those at the restaurant's and other vendor's premises (or their own websites), as well as in comparison to all other sale channels, i.e. other on-demand delivery platforms.
   – Termination of cooperation: in most cases termination was due to organizational and financial reasons. However, signing exclusive contracts is also listed as one of the reasons for termination of cooperation, which raises concern with the CPC. Signing of exclusive contracts, as well as

[21] Other vendors include supermarkets, and various shops selling mostly groceries or consumer goods.

offering various forms of discounts and other incentives that reward restaurants and other vendors for their "loyalty" to the digital platform, may as a result exclude competitors from the market, thus also lowering the level of competition on the subject market.

In conclusion, reviewing the provided agreements, the CPC has noticed provisions that could result in the CPC's concern, in terms of behavior that is (1) exclusive– aimed at exclusion of other platforms, (2) exploitative – aimed at discrimination of restaurants and other vendors through the application of unequal business terms, and that individual contractual provisions could even be considered as (3) limiting technical development.

2) Cooperation between on-demand delivery platforms and delivery partners – Cooperation between on-demand delivery platforms and delivery partners is regulated by agreements concluded between the on-demand delivery platform and companies or entrepreneurs that possess the adequate technical, material and human resources for delivery services. The CPC notes that digital platforms act not only as intermediaries, but through their algorithms, exert a significant influence on all important aspects of that relation. For instance, algorithms enable the selection of the delivery person who will carry out a specific order, perform supervision of the delivery (via GPS), as well as of the provided evaluation. Such a business concept may indicate a significantly more complex subordination system between the delivery partners and on-demand delivery platforms.

3) Cooperation between on-demand delivery platforms and technical partners establishing and regulating cooperation with technological and technical partners are key to performing the activities of on-demand delivery platforms. Depending on the type and scope of the required services, market participants have established cooperation with global (Amazon, Hetzner, Google), and local technical partners, mainly providers of payment services. The CPC is of the opinion that connection and integration of on-demand delivery platforms with digital services of their primarily global technical partners can significantly influence their market power. Bearing in mind the character of the market in question, the CPC concluded that the development and implementation of Google's "Order Online" button affects the creation of a market environment in which Google's partnerships with certain market participants (on-demand delivery platforms) can contribute to competition distortion on the subject market.

2.4. CPC's recommendations[22]

Considering the character and dynamic development of the on-demand delivery platforms market and taking into account the obligations undertaken by Serbia under the Stabilization and Association Agreement[23], the CPC recommends that all competent institutions of the Republic of Serbia analyze the existing legal solutions concerning the subject area, and perform the necessary harmonization of national legislation with current legal acts of the European Union. In particular, the CPC addresses the Ministry of Trade, recommending that it starts drafting relevant legislation that would regulate the activities of digital platforms. This would also include the establishment of the Register of Digital Platforms, and of the Register of Delivery Partners.

3. Abuse of dominant position proceedings

During the term of described Sector Analysis, the CPC received an initiative that describes the business operation of the Glovoapp Technology platform – an on-demand delivery platform ("Glovo") holding, according to the Sector Analysis, a dominant position in the market. The initiative describes how Glovo uses payments and incentives in attempts to secure partner exclusivity.

By reviewing the contracts concluded by Glovo with individual restaurants, as well as Glovo's general Business Terms, the CPC has determined that certain provisions may be considered as incentives to create exclusivity with Glovo. For instance, partners are obligated to pay a fee in case of entering into cooperation with similar platforms; some restaurants are offered large sums in the form of investments for marketing, with the obligation to return the amount if cooperation with another platform is established; unfavorable conditions for termination of the contract before its expiration and agreed penalties in case of violation of this provision are also provided. The CPC also suspects that Glovo applies unequal business terms for the same services with different partners. This primarily relates to different commissions towards different partners, depending on whether they cooperate exclusively with Glovo. Taking into account these findings, the CPC suspects that Glovo performs abuse of dominant position including, but not limited to the manners that are above described. Therefore, under its Conclusion dated November 2,

[22] Sector Analysis, p. 38.

[23] Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, Official Journal L 278, 18/10/2013 P. 0016 – 0473 <https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-serbia.html> accessed 2 April 2023.

2022[24], the CPC has initiated the proceeding for determination of abuse of dominant position against Glovo. As at the time of writing, the CPC has not yet published any decision relating to this case, therefore it is presumed that the procedure is ongoing.

4. CPC's limited activities in e-commerce concentrations

When it comes to Serbia and the CPC's investigation measures to detect failures to notify a concentration, it is worth noting that up until recently the CPC wasn't proactive when it comes to merger notifications. However, it seems that this is about to change as well. The CPC's latest case of unnotified concentration involves a local e-commerce company – Ananas, which acquired a company in the neighboring North Macedonia with similar business activities. This is also the first case that the CPC's initiated due to unnotified acquisition of a foreign target; however, the buyer itself was meeting the thresholds for notification. This only shows that the CPC's interest in the e-commerce will remain in the following period.

However, one of the most recent acquisitions in the past period was certainly the acquisition of Donesi by Glovo. Glovo acquired Donesi (a leading on-demand platform for delivery of food) back in 2021. According to the above-mentioned Sector Analysis, in the year of acquisition (2021), Glovo had a market share of 20–30%, while Donesi had a market share of 30–40%, so the concentration itself resulted in Glovo being a candidate for holding a dominant position in the market. To the best knowledge of authors of this paper, it is unknown whether this concentration was assessed by the CPC, or whether it exceeded the threshold at the time (there are no relevant decisions published at the CPC's website, and no word of Glovo and Donesi in the list of approved concentrations from the CPC's annual report for 2021). Even if it went under the CPC's radar, i.e. it did not exceed the threshold, this concentration may have prompted the CPC to conduct the above sector analysis in this market, which deserves praise. However, this also points to a conclusion that, if this transaction indeed went under the thresholds, the thresholds may not be appropriate for assessment of concentration of fast-growing markets.

[24] CPC case 5/0-01-758/2022-01, Glovoapp Technology doo Beograd, 2 November 2022. This conclusion initiated the procedure for determination of abuse of dominant position against Glovoapp Technology doo Beograd. The document is published on the website of the CPC, and may be viewed at the following link: <https://kzk.gov.rs/kzk/wp-content/uploads/2022/11/Zaklju%C4%8Dak-o-pokretanju-postupka-GLOVO.pdf> accessed 2 April 2023. A separate decision will be rendered once the procedure is completed.

III. Comparison of global and local trends in competition law enforcement in e-commerce

The above listed case law confirms that problems in e-commerce market in Serbia follow global trends discussed at OECD Roundtable on Implications of E-commerce for Competition Policy, held in June 2018[25]. By now, the use of algorithms has been widely discussed from various points of view significant for competition legislation[26]. The Executive Summary from the Roundtable[27] confirms that a defining characteristic of e-commerce markets is the re-emergence of vertical restraints as a core competition-law concern, with typical examples of such restrictions being selective distribution systems, bans on internet sales, retail price maintenance (RPM), dual pricing policies, etc.[28] However, the participants in this Roundtable also noticed that, although there has been comparatively less enforcement against abuse of dominance to

[25] OECD, Implications of E-Commerce for Competition Policy (2018) <www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm> accessed 2 April 2023.

[26] Ingrid Vandenborre, Michael J. Frese 'Algorithmic Pricing: Candidate for the New Competition Tool?' in Claire Jeffs (ed), *E-commerce Competition Enforcement Guide* (2020) <https://www.skadden.com/-/media/files/publications/2020/11/ecommercecompetitionenforcementguidealgorithmprici.pdf?rev=0722f764cf324c62aedc0f50b1a31ddb> accessed 2 April 2023; OECD, Algorithms and Collusion – Note from the European Union (21–23 June 2017) <https://one.oecd.org/document/DAF/COMP/WD(2017)12/en/pdf> accessed 2 April 2023. As explained in paragraph 15: "increased price transparency through price monitoring software enables easier detection of those retailers that deviate from manufacturers' pricing recommendations. It could therefore allow manufacturers to retaliate against retailers that do not comply with pricing recommendations and, therefore, limit the incentives of retailers to deviate from such pricing recommendations in the first place" and paragraph 36 concludes that "In a vertical context, price monitoring algorithms may be used by suppliers to monitor fixed or minimum prices, or to monitor "recommended" prices so as to exercise pressure on, or provide incentives to, the retailer to respect those recommended prices, thereby turning them into fixed or minimum sale prices (RPM). Finally, the use of price monitoring/matching algorithms by one retailer may have the effect that higher prices spread from sellers that engage in RPM to other sellers"; OECD, 'OECD Handbook on Competition Policy in the Digital Age' (2022) <https://www.oecd.org/daf/competition-policy-in-the-digital-age/> accessed 2 April 2023 ('OECD Handbook'), page 37: "Algorithmic pricing may be a tool for collusion… The centrality of digital platforms in certain markets can enable vertical foreclosure, or the imposition of restraints that limit the intensity of competition"; OECD, Algorithms and Collusion: Competition Policy in the Digital Age (2017) <https://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf> accessed 2 April 2023.

[27] OECD, Executive Summary of the Roundtable on Implications of E-commerce for Competition Policy, Annex to the Summary Record of the 129th Meeting of the Competition Committee held on 6–8 June 2018' (15 May 2019) <https://one.oecd.org/document/DAF/COMP/M(2018)1/ANN3/FINAL/en/pdf> accessed 2 April 2023 ('OECD Executive Summary').

[28] OECD Executive Summary, p. 5.

date, this is likely to become a more prominent concern as large e-commerce platforms rapidly increase their market share, especially large online retail platforms[29]. According to the OECD Executive Summary, the wide e-commerce environment involves a variety of economic factors, including online retailers, marketplaces, and price comparison tools[30]. This, concludes the Roundtable, presents both opportunities and challenges to competition policy, since online retailing has the potential to increase retail competition, but certain dynamics may prompt anticompetitive agreements or unilateral conduct. Another publication by OECD noted that competition law enforcers should be at least alerted to the risk that collusion might become easier to sustain and more likely to be observed when algorithms are involved[31].

It seems that the possibility of increasing retail competition has prompted the undertakings in Serbia to conclude anticompetitive agreements, i.e. practice unilateral conduct, having in mind that internet shopping greatly expands consumer choice, both by increasing the range of retail outlets and by increasing the amount of information available, thus reducing search costs[32]. The CPC has certainly used the advantages of online shopping to identify anticompetitive behaviors – the above cited decisions of the CPC show that the CPC has simple and yet very effective tools in identifying competition law breaches – websites of wholesale and retail companies, especially online retail platforms, but also the above-mentioned aggregators and other price monitoring systems[33]. They also show that the level of awareness of competition law rules is quite inadequate, but it can be concluded that undertakings in Serbia do understand the benefits of online shops for consumers, having in mind that

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[29] Ibidem.

[30] Ibidem, p. 2.

[31] OECD 2017 Report titled "Algorithms and Collusion – Background Note by the Secretariat", states in section 4.3.1 Monitoring algorithms, p. 24–26: "The most obvious and simple role of algorithms as facilitators of collusion is in monitoring competitors' actions in order to enforce a collusive agreement. This role may include the collection of information concerning competitors' business decisions, data screening to look for any potential deviations and eventually the programming of immediate retaliations. The collection of data might be the most difficult step out of this process. Even if pricing data is publicly available it does not necessarily mean that a market is transparent. Companies that take part in a conspiracy still need to aggregate that data from all competitors in an easy-to-use format that can be regularly updated. This is already done by some price comparison websites, also known as aggregators, which either receive data directly from online companies or, instead, use web scraping, an automated process to extract data from websites using software applications such as internet bots […] In conclusion, monitoring algorithms may facilitate illegal agreements and make collusion more efficient, by avoiding unnecessary price wars."

[32] OECD Executive Summary, p. 1.

[33] For relevant EU practice in this matter, see Case AT.40465, *Asus (vertical restraints)* (2018) (2018/C 338/08).

their anticompetitive practices were mostly focused on keeping or increasing their profits by controlling online prices, by using publicly available aggregator (eponuda.com – intended primarily for consumers) to detect deviations from agreed prices, but also other software tools, such as "Kliker". As some of these proceedings were (from the CPC's point of view) successfully completed, at least for now, it can be concluded that the use of online trade tools followed by a dawn raid are the CPC's most important means for identifying anticompetitive behaviors and initiating *ex officio* proceedings in the retail sector. Although the tools are (mostly) limited to the retail sector, they can also provide valuable hints on deals and breaches at the wholesale level. However, this applies only to specific anticompetitive behavior which is easily identified, such as resale price maintenance. Finally, although online tools (such as pricing algorithms) have their benefits – pricing transparency being the most important one, it must be noted that the identification of other types of (non-publicly available) algorithmic collusion may be difficult to address[34]. An important common denominator in all cases conducted by the CPC is the fact that the CPC, following their online inquiries, conducted numerous dawn raids, which resulted in more than a solid proof of explicit collusion, including the use of special software for price monitoring. The question remains, has there not been such proof, whether the CPC would try to enforce the law by going for a tacit collusion.

When it comes to abuse of dominant position by leading companies in e-commerce sector, it seems that the CPC depends on initiatives of other market participants, which is not unusual, having in mind that holding a dominant position itself is not prohibited, and proving abuse of such decision is a very sensitive matter which requires more than one indication. In such circumstances, a complaint of the rival platform is not only necessary, but also "constitutes strong evidence of abuse of market power"[35]. It seems that local law enforcement follows global trends in this area as well. It is reported that exclusive dealing is particularly exclusionary for e-commerce, because the tactic destroys the multi-homing nature of e-commerce, transforming it to a single-homing.[36] Thus, the focus of competition authorities around the world have been anticompetitive practices of e-commerce giants, such as

[34] OECD, Algorithms and Collusion: Competition Policy in the Digital Age (2017) <https://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf> accessed 2 April 2023, p. 34.

[35] Toshiaki Takigawa 'What Should We Do about E-Commerce Platform Giants? – The Antitrust and Regulatory Approaches in the US, EU, China, and Japan' (2022) <https://ssrn.com/abstract=4048459> accessed 2 April 2023.

[36] Ibidem.

Alibaba[37] in China and Amazon in the EU[38]. Although there is a number of actions in the e-commerce sector which result in abuse of a dominant position (in the Amazon case, the main concerns were the use of non-public data relating to independent's sellers' activities, unequal treatment of seller when ranking the offers and discriminatory conditions and criteria for qualification of marketplace sellers and offers to Prime), the Serbian CPC is still mostly focused on more "standard" anticompetitive behaviors related to a dominant position, such as exclusivity and predatory pricing.

Finally, when it comes to mergers and acquisition in e-commerce, these are also becoming an interesting topic, with main question being whether the current legislative framework is good enough to assess all the potentially negative effects of mergers and acquisitions. The OECD reports that the dynamic nature of digital markets poses a challenge for competition authorities, particularly when the effects of a merger may continue to develop beyond the time horizon normally considered in merger review[39]. Some characteristics of mergers and acquisitions in dynamic markets, including e-commerce, are the high rates of entry and exit, tendency of innovations to disrupt business models and the need to pay particular attention to innovation capacity of the firms in the market[40]. The OECD report seem to reflect the situation in Serbia as well, especially considering an important acquisition that was (at least according to publicly available information) not assessed by the CPC, but resulted in potential abuse of a dominant position only two years later. In any case, the CPC will need to assess business and innovation capacities of e-commerce business models to the extent necessary to predict any and all long-term negative effects, which may be a challenging task when e-commerce companies are involved for reasons listed above.

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[37] 'Alibaba and Tencent Fined in China Tech Crackdown' (*Forbes*, 13 July 2022) <https://www.forbes.com/sites/qai/2022/07/13/alibaba-and-tencent-fined-in-china-tech-crackdown/?sh=fe3df9e3dacb> accessed 2 April 2023.

[38] European Commission Press Release 'Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime' (20 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777> accessed 2 April 2023.

[39] OECD Handbook, p. 47.

[40] OECD Handbook, p. 47; OECD 'Merger Control in Dynamic Markets' (2020) <https://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf> accessed 2 April 2023, p. 37–39: "It is now generally recognized that merger control should look at the competitive effects of mergers beyond the very short term, considering how a transaction is likely to affect market outcomes in a foreseeable time horizon […] As interest in the long-term effects of mergers grows, it is likely that academics and practitioners will keep developing refined assessment tools to help improving the precision of merger enforcement".

IV. Conclusion

We can see that the CPC has recently finally started carrying out multiple duties, entrusted to them under the Law when it comes to enforcement activities, and promoting of competition policy, and we can only hope that the series of enhanced activities will continue in the future. However, there are certain shortcomings that need to be fixed sooner than others.

One such problem is the lack of more detailed guidance and regulations. With the rise of e-commerce and other digital markets, it seems that a more detailed guidance is much needed, to avoid the matter of rising legal uncertainty when applying "traditional" rules to not so traditional markets. The CPC does try to mitigate the effect of the lack of its legislative actions by enhancing its advocacy activities, however it may be argued that legislative intervention by the CPC, and even the legislative body, is necessary.

Apart from harmonization of local regulations with the EU rules, a matter that deserves special attention is whether the CPC can handle more sophisticated cases and what means are necessary for the CPC. The CPC is one of the youngest among European competition authorities, so they are still lacking much needed experience, but also tools to deal with more delicate cases where competition infringement may not be obvious at first sight. The CPC will most certainly have a crucial role in keeping a healthy competitive environment in the fast-changing digital sectors, especially e-commerce. As the OECD Handbook rightfully notices and we cannot agree more: "Some concerns about dynamics in digital markets fall squarely within a competition enforcement context, namely with respect to anti-competitive conduct and mergers giving rise to durable market power. However, competition authorities will need to adapt their analytical tools to the unique conditions of digital markets."[41]. From its most recent case law, it seems that the CPC is aware of its role and importance – the CPC will need to handle more and more sophisticated cases that will undoubtfully be on the rise with constant development in the emerging markets. Our opinion is that CPC's focus in the following period will remain on hard-core anti-competitive behavior, with simultaneous and constant education of the participants about the importance and the role of competition regulations. In the end, it should be noted that the scope and complexity of the CPC's activities, as a relatively young competition body, also depends on available resources, both financial and human, as well as their proper allocation, which could especially be challenging, having in mind the complexity of proceedings for anti-competitive behavior in this specific sector.

[41] OECD Handbook, p. 15.

Finally, concentrations in the e-commerce sector also deserve special attention, considering the fast-occurring and long-impact consequences that result from specifics of mergers in fast-growing markets. Control of such concentrations may be an important prevention tool for any future anticompetitive conduct, but the question remains whether all possible effects of such concentrations can be assessed by CPC to a satisfactory extent in advance, and whether the concentration assessment rules currently in place (including threshold rules) are appropriate for assessing such concentrations.

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